UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: January 9, 1992

FAA Order No. 92-1

In the Matter of:	Docket No. CP89WP0351
MICHAEL JOHN COSTELLO	

ORDER GRANTING RECONSIDERATION
AND PARTIALLY GRANTING APPEAL

FAA Order No. 91-50 held that good cause existed to excuse the lateness of Respondent's notice of appeal and appeal brief because "a genuine question appears to exist regarding whether the settlement agreement entered into by the parties truly reflects a meeting of the minds of the parties." In the Matter of Costello, FAA Order No. 91-50 at 3 (October 9, 1991). Complying with that order, Complainant filed a reply brief. Complainant also has filed a petition for reconsideration of FAA Order No. 91-50, arguing that the Administrator should not have considered the merits of the underlying appeal when determining whether good cause existed for the lateness of Respondent's notice of appeal and appeal brief.

Respondent has filed a reply to Complainant's petition for reconsideration, in which he argues that his notice of appeal was timely. According to Respondent, the law judge did not

issue an initial decision orally on the record, but instead, once the parties had settled the case, the law judge merely announced that the record was closed. Respondent further argues that he considered the law judge's written decision entitled "Decision and Order Assessing Penalty and Dismissing Appeal," issued on June 25, 1991, as the initial decision, and that, accordingly, he filed his notice of appeal on July 3, 1991, in accordance with 14 C.F.R. §§ 13.233(a)[1/] and 13.211(e).[2/] Respondent concedes that because he misread the rule pertaining to perfecting appeals, 14 C.F.R. § 13.233(c), he filed his appeal brief on August 23, 1991, 4 days late.

In FAA Order No. 91-50, the law judge's statements concluding the hearing were regarded as an initial decision. This was error. Upon consideration of the Complainant's petition for reconsideration and Respondent's reply, as well

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1/ Section 13.233(a) of the Rules of Practice, 14 C.F.R. § 13.233(a), provides in pertinent part as follows:

> A party shall file the notice of appeal not later than 10 days after entry of the oral initial decision on the record or service of the written initial decision on the parties and shall serve a copy of the notice of appeal on each party.

2/ Section 13.211(e) of the Rules of Practice, 14 C.F.R. § 13.211(e), (the "mailing rule") provides in pertinent part:

> Whenever a party has a right or duty to make any response within a prescribed period after service by mail, or on a date certain after service by mail, 5 days shall be added to the prescribed period.

as the remainder of the record in this case, FAA Order No. 91-50 is reversed in its entirety.

After assuring himself that a settlement satisfactory to both parties had been reached, the law judge closed the hearing record, but he did not issue an "initial decision" as that term is used in Section 13.232(a) of the Rules of Practice, 14 C.F.R. § 13.232(a).[3/] Consequently, he did not lose jurisdiction over the matter,[4/] and, accordingly, the 10-day period for filing an appeal from an initial decision did not begin to run.

3/ Section 13.232(a), 14 C.F.R. § 13.232(a), provides in pertinent part as follows:

> In each oral or written decision, the administrative law judge shall include findings of fact or conclusions of law, and the grounds supporting those findings and conclusions, upon all material issues of fact, the credibility of witnesses, the applicable law, any exercise of the administrative law judge's discretion, the amount of any civil penalty found appropriate by the administrative law judge, and a discussion of the basis for any order issued in the proceedings.

In this case, the law judge made no findings of fact or conclusions of law. Indeed, the hearing was interrupted when the parties informed the law judge of the settlement.

4/ Thus, this case is distinguishable from the cases in which it was held that that the law judge loses jurisdiction of a case once an initial decision has been issued. E.g., In the Matter of Gabbert, FAA Order No. 90-27 (October 11, 1990); In the Matter of Degenhardt, FAA Order No. 90-20 (August 16, 1990).

The Rules of Practice do not contemplate appeals from orders assessing civil penalty. In the Matter of Rocky Mountain Helicopters, Inc., FAA Order No. 90-16 at 1 (April 5, 1990). However, in certain narrow circumstances, an appeal to the Administrator has been permitted after the issuance of an order assessing civil penalty. See In the Matter of USAir, Inc., FAA Order No. 90-22 (August 16, 1990); In the Matter of Rocky Mountain Helicopters, Inc., FAA Order No. 90-16 (April 5, 1990). Although the situation is somewhat different here because Respondent first filed a motion with the law judge rather than with the Administrator, review of the amended order assessing civil penalty is appropriate in light of the peculiar and troublesome circumstances of this case. It was appropriate for the Respondent to file his motion with the law judge because here, unlike the usual situation, the law judge had not lost jurisdiction over the case.

As noted above, Respondent concedes that if the law judge's written order is considered to be an "initial decision" his appeal brief, served on August 23, 1991, was late. Under Section 13.233(a) of the Rules of Practice, 14 C.F.R. § 13.233(a), an appeal must be perfected within 50 days of the issuance of an initial decision, and under the mailing rule, 14 C.F.R. § 13.211(e), a party is entitled to an extra 5 days from the date of service of the law judge's written initial decision. The issue then is whether good cause has been shown to excuse the lateness of that appeal brief. See 14 C.F.R. § 13.233(c)(2) ("[t]he FAA decisionmaker

may grant an extension [of time for the filing of an appeal brief] if good cause for the extension is shown in the [written] motion.") I am persuaded that the existence of a question regarding whether the parties had reached a meeting of the minds when they "settled" the case does not constitute good cause to excuse the lateness of Respondent's appeal brief, because the focus should not be on the merits of the underlying appeal, but upon the reason that the document was filed late. I am also of the view that misinterpreting the Rules of Practice does not constitute good cause. Consequently, I will not consider the appeal brief served on August 23, 1991.

Even without consideration of Respondent's appeal brief, however, Respondent's arguments are still before me as he presented them in considerable detail in his notice of appeal. As a result, his appeal will be considered to be perfected as of the time he filed his notice. In the Matter of Park, FAA Order No. 91-45 (September 11, 1991).

Turning then to the merits of the appeal, Respondent has argued that the amended order assessing civil penalty does not accurately reflect his understanding of the settlement of the parties. Respondent's argument, in essence, is that although he thought that counsel for Complainant and he had agreed to a compromise order that did not contain a finding of any violations, Complainant issued an order assessing civil

penalty that included a statement of Respondent's violations.[5/] Respondent argued in his notice of appeal that at the hearing, counsel for Complainant, "[i]n reading the settlement into the record,...slipped in the phrase 'the violations to remain the same' which phrase the defendant, due to his lack of knowledge of legalese, failed to fully understand and would not have agreed to."

The following discussion occurred at the hearing:

> Agency attorney: Complainant and Respondent have reached an agreement to settle this action for the amount of $5000 civil penalty to be paid in installments over a 12-month period--whatever those installments are, I haven't figured it out, it's $400 and something. And that's it. The violations are to remain the same.
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> Judge Burch: All right. Are you in agreement with this settlement, Mr. Costello?
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> Mr. Costello: I am, Your Honor.
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> Judge Burch: All right. Does this resolve the matter?
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> Agency attorney: Yes, Your Honor, it does.
>
> Mr. Costello: I'm satisfied.
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> Judge Burch: All right. The case has been settled; therefore, we will close the record. Thank you.

TR. 15-16 (emphasis added).

[5/] Compromise orders are described at 14 C.F.R. § 13.16(l), and orders assessing civil penalty are described at 14 C.F.R. § 13.16(b).

When the agency attorney stated that "the violations are to remain the same," she undoubtedly intended that the violations alleged in the complaint would be included in the order assessing civil penalty. However, I recognize that Respondent may have failed to understand the significance of this phrase. Consequently, Complainant is ordered to withdraw the amended order assessing civil penalty, and the case is remanded to the law judge for further proceedings.

This case illustrates the pitfalls inherent in reliance upon an oral stipulation of a settlement at a hearing. Where, as here, parties do not reduce to writing the terms of a settlement, the adjudication process can be delayed needlessly, resulting in a waste of time, money and judicial resources. In the future, agency attorneys and respondents should prepare written settlement agreements that specify all relevant terms, including whether there will be a finding of violations.

Finally, and in light of this decision, Respondent's arguments that he was denied discovery and that the agency attorney and the law judge engaged in ex parte communications, can only be raised now through an interlocutory appeal under 14 C.F.R. § 13.219.

THEREFORE, IT IS ORDERED THAT:

1. Complainant's petition for reconsideration is granted and FAA Order No. 91-50 is reversed; and

2. Respondent's appeal is granted and the case is remanded to the law judge for further proceedings.

BARRY LAMBERT HARRIS
Acting Administrator
Federal Aviation Administration

Issued this 7th day of January, 1992.